No. 15004

United States Court of Appeals

For the Ninth Circuit

WESTERN CANADA STEAMSHIP CO., LTD., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

REPLY BRIEF OF APPELLANT WESTERN CANADA STEAMSHIP CO., LTD.

BOGLE, BOGLE & GATES
STANLEY B. LONG
C. CALVERT KNUDSEN
Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 15004

United States Court of Appeals

For the Ninth Circuit

WESTERN CANADA STEAMSHIP CO., LTD., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

REPLY BRIEF OF APPELLANT WESTERN CANADA STEAMSHIP CO., LTD.

BOGLE, BOGLE & GATES
STANLEY B. LONG
C. CALVERT KNUDSEN
Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

Page

TABLE OF CASES

TEXTBOOKS

STATUTES AND RULES

United States Court of Appeals
For the Ninth Circuit

Western Canada Steamship Co., Ltd., a corporation,	*Appellant,*	No. 15004
vs.		
United States of America,	*Appellee.*	

Appeal from the United States District Court,
Western District of Washington
Northern Division

REPLY BRIEF OF APPELLANT WESTERN CANADA STEAMSHIP CO., LTD.

I.

INTRODUCTION

Notwithstanding appellee's vigorous attempts to create a contrary impression, this is a simple case involving only the most elementary principle of charter party law, *i.e.,* that a time charterer is liable to the owner for any delay in redelivery resulting from the charterer's lack of due diligence in the prosecution of an overlap voyage.

The occupation of Japan has nothing to do with this case. At no time did appellee even purport to be acting in its capacity as an occupying power in connection with this charter party.

Likewise, the United Nations has nothing to do with this case. Appellant dealt exclusively with the United

States Navy (M.S.T.S.) and the United States Army. As Colonel Sanderson testified, all American supplies were forwarded to Japan and Korea by M.S.T.S. ships (Tr. 322); British forces were supplied by British ships (Tr. 323). It is apparent that appellee had its own ports and discharge facilities in Japan and the British had their own (Tr. 323). Kure itself was a British port, made available to appellee so long as British ships were given first call on port facilities (Tr. 308, 323). Colonel Sanderson, appellee's own witness, testified that: "We had no control over any other ships in that harbor except those carrying POL, packaged POL, and ammunition. We had no control." (Tr. 323) Under these circumstances, appellee certainly cannot hide its own shortcomings in the performance of its contract behind the facade of the United Nations.

Appellee's argumentative statement of the questions presented (Br. 24) assumes the very facts disputed on this appeal, and thus does not fairly present the questions involved herein to the Court. Appellee's statement of the case (Br. 4-12) is also argumentative, to say the least. Rather than shift the focus of this argument to a morass of petty bickering over such matters, appellant will quote in detail herein the testimony relevant to each issue.

II.

ARGUMENT

A. The Findings Herein Complained Of Do Not Fall Within the "Clearly Erroneous" Rule and Hence May Be Set Aside if This Court Differs with the Trial Court on the Weight of the Evidence.

Contrary to appellee's assertions, and to the implications of appellant's opening brief, this Court is not bound by the "clearly erroneous" rule with respect to the findings herein complained of, for two reasons. First, the findings complained of are conclusions of ultimate fact (bordering upon conclusions of law), made as secondary inferences from the entire evidence, which was substantially undisputed; and second, the findings complained of are not based upon "demeanor testimony" in the court below, but upon depositions, pretrial discovery and other documentary evidence, so that the credibility of witnesses is not in issue.

1. Findings of fact in the nature of conclusions of ultimate fact are not subject to the "clearly erroneous" rule.

All the Supreme Court held in *McAllister v. United States,* 348 U.S. 19 (1954), in the final analysis, was that:

> "No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52 (a) of the Federal Rules of Civil Procedure."

What is the scope of review under Rule 52 (a)? As this Court has repeatedly held:

> "When a finding is essentially one dealing with

> the *effect* of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions." (Italics added)

Stevenot v. Nordberg, 210 F.(2d) 615, 619 (C.A. 9 1954); *Brown v. Cowden Livestock Company,* 187 F. (2d) 1015, 1018 (C.A. 9 1951); *Plomb Tool Co. v. Sanger,* 193 F.(2d) 260, 264 (C.A. 9 1951); *Pacific Portland Cement Co. v. Food Machinery and Chemical Corporation,* 178 F.(2d) 541, 548 (C.A. 9 1950); *Smith v. Royal Insurance Co.,* 125 F.(2d) 222, 224 (C.A. 9 1942).

In the case at bar the findings complained of are findings dealing essentially with the *effect* of certain transactions or events shown by undisputed evidence, *i.e.,* that the redelivery of the Vessel to appellant "was not delayed by any inexcusable act or omission connected with the loading of her cargo at Bangor," that the Vessel was discharged at Kure "as soon as discharging facilities were available, in accordance with military priorities then in effect and the urgent needs of the Armed Forces engaged in hostilities in Korea," that appellee "exercised reasonable diligence in all of the circumstances in its performance of the charter party," that the delays at Bangor and Kure were caused by sovereign acts and thus excused under the "restraint of princes" exception in the charter party, and that appellant "failed to perform the terms and conditions of Article 29 of the charter party by failing to make any demand for negotiations for a revision of the rate of

charter hire under the terms and conditions of Article 29."

No witness testified to any of these ultimate conclusions. They are the conclusions of the trial judge from the undisputed evidence. This Court is free to draw its own conclusions from that evidence free of the restrictions of the "clearly erroneous" rule.

2. Findings of fact based upon "non-demeanor" evidence are not subject to the "clearly erroneous" rule.

In *Equitable Life Insurance Society of the United States v. Irelan,* 123 F.(2d) 462, 464 (C.A. 9 1941), this Court stated the rule as follows:

> "Since all testimony bearing on the circumstances antecedent to and surrounding her death was by deposition, the finding of accidental death, while it is justly entitled to consideration, has not the weight we would otherwise be obliged to concede to it. This court is in as good a position as the trial court was to appraise the evidence and we have the burden of doing that. Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A. following §723(c), was intended to accord with the decisions of the scope of the review in Federal Equity Practice; and, as is well known, in the federal courts where the testimony in equity or admiralty cases is by deposition the reviewing court gives slight weight to the findings."

See, also, *Orvis v. Higgins,* 180 F.(2d) 537 (C.A. 2 1950), certiorari denied 340 U.S. 810 (1950), and *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948), on this point. The rule is clear that under Rule 52(a) the appellate court is free to disregard

findings of the trial court based upon evidence not involving the judgment of the trial court as to the credibility of the witnesses.

Here, substantially all of the evidence relating to the findings complained of consists of depositions, written exhibits, and answers to interrogatories. Accordingly, this Court need not attach undue weight to such findings, since the trial court's conclusions could not have been based upon any estimate of the credibility of the witnesses from their demeanor, manner or appearance. As a matter of fact, having the entire record before it in printed form, this Court is in a *better* position than was the trial court to draw ultimate conclusions.

B. The Vessel Was Not Redelivered to Appellant in Compliance with the Plain Terms of the Charter.

The charter party simply provides that:

> "This Charter shall be for a period of about 120 days from the time of delivery of the Vessel or to the termination of the voyage current at termination date."

An option for a 120-day extension in favor of appellee was deleted from the charter party form (Tr. 98-99; Ex. 1).

There is nothing magical in the phrase "or to the termination of the voyage current at termination date." Normally, under an "about" charter the charterer must either overlap or underlap, whichever will result in redelivery closest to the end of the flat period specified. Poor on Charterparties and Ocean Bills of Lading 12 (4th ed. 1954). This being the case, it is apparent that the only effect of the clause "or to the end of the

voyage current at termination date'' was to give appellee an absolute right to overlap, whether or not an underlap would result in redelivery closer to the flat period.

On the other hand, nowhere does the charter party even purport to relieve the charterer from the consequences of its own lack of due diligence in the prosecution of an overlap voyage, and it is this lack of due diligence that gives rise to appellant's right of recovery in this action. *The Rygja,* 161 Fed. 106 (C.A. 2 1908).

Under the circumstances then, having failed to exercise due diligence in the prosecution of the overlap voyage, appellee failed to perform its obligations under the charter party and appellant is entitled to recover its damages occasioned by that failure.

Appellee attempts to derive some solace from the fact that at the time the charter party was entered into both parties contemplated the carriage of munitions to Japan, and appellant knew of the occupation of Japan and the outbreak of the Korean War. However, these facts militate against appellee, not appellant, for two reasons.

First, it is settled law that the ''restraint of princes'' exception applies only to future restraints, not existing restraints. *Rotterdamsche Lloyd v. Gosho Company, Inc.,* 298 Fed. 443 (C.A. 9 1924), certiorari denied 266 U.S. 621 (1924). Second, where a party knows of a condition which might interfere with his performance of a contract and fails to specify the occurrence of the condition as an excuse for his non-performance, he is not excused from performance by the occurrence of the

condition. In other words, it was up to the appellee, which had the duty to load and discharge the Vessel with reasonable diligence, to provide for congestion as an exception in the "mutual exceptions" clause if it desired its non-performance to be excused thereby. *Inter-Coast S.S. Co. v. Seaboard Transp. Co.,* 291 Fed. 13 (C.A. 1 1923); see *W. K. Niver Coal Co. v. Cheronea S.S. Co.,* 142 Fed. 402, 414 (C.A. 1 1905), certiorari denied 201 U.S. 647 (1906).

Thus, to the extent that the then existing occupation of Japan or United Nations intervention in Korea operated as a "restraint of princes," or to the extent that appellee should have contemplated the future congestion in Japanese ports, they cannot be relied upon to excuse the delay in Japan that subsequently ensued. That appellee should have anticipated the congestion is admitted at page 18 of appellee's brief. Yet, appellee failed to provide against such otherwise inexcusable delays in the charter party, which was its own standard form of contract.

C. All of the Evidence in the Record, Without Contradiction, Clearly Shows That the Redelivery of the Vessel Was Unreasonably Delayed by Reason of Appellee's Failure to Load the Vessel with Reasonable Diligence or Within a Reasonable Time Under the Circumstances at Bangor.

Having in mind the broad scope of appellate review that is permissible in this case, appellant submits the following uncontradicted evidence as requiring a finding in its favor regarding the delay at Bangor:

(1) Captain Craig, the master of the Vessel, who is

no longer employed by appellant and thus not subject to bias or prejudice (Tr. 175), who has had years of experience at sea (Tr. 175-178), who was the only witness who was present during the loading at Bangor, who observed the facilities available for loading and who observed the actual loading (Tr. 196), testified that all the Vessel's derricks and winches were available for loading, that the Vessel was loaded in berth, and that cargo was brought alongside in railroad cars and thence up to ship's tackle by civilian longshoremen employed by the M.S.T.S. (Tr. 196). He further testified as follows:

> "Q. Based upon your experience as an officer and master of ocean-going vessels, . . . was that vessel loaded within a reasonable time at Bangor, . . . having in mind the cargo loaded, and the amounts thereof?
>
> * * *
>
> A. I don't think so." (Tr. 195)
>
> " * * *
>
> A. In my opinion twelve days would be a reasonable time for loading that cargo." (Tr. 196)

(2) The Vessel was not loaded twenty-four hours a day, seven days a week, as was the custom in west coast ports, and appellee has failed to show circumstances excusing the delay. In this regard Captain Craig testified unequivocally with respect to both Canadian and American west coast ports, and with respect to both general and bulk cargo, as follows:

> "A. * * * It is the custom there to have continuous loading. * * * 24 hours a day. * * *
>
> Q. What is the custom with respect to a 7-day week. A. Well, they work week ends also.
>
> * * *

Q. Was this custom followed by the United States in loading the vessel at Bangor? . . .

A. No. * * * " (Tr. 190)

Instead, the Vessel was worked 24 hours a day for only three days, then left idle for the week-end, then worked only one or two shifts a day for five days and left idle for another week-end, then worked only one shift a day for five days and left idle for a third week-end, then worked only one shift a day for four and a half days until loading was completed (Tr. 190-194).

(3) Captain Clarke, likewise an experienced ship's officer and steamship operator, testified as follows:

"Q. * * * How much time . . . would it reasonably take to load approximately 9,000 tons of ammunition aboard a vessel such as the S.S. Lake Sicamous under normal port conditions with adequate loading facilities?

* * *

A. 12 to 14 days." (Tr. 274-275)

(4) The Vessel was actually loaded at Bangor in a total working time of only nine days, nineteen hours and thirty minutes (Tr. 190-195).

(5) The vessel actually discharged the same cargo in two different ports of discharge in a total working time of less than ten days (less than three days at Moji (Tr. 202-204) and less than seven days at Kure (Tr. 209)).

(6) On the first voyage the Vessel was loaded at Mukilteo in a total elapsed time of 14 days, 8 hours and 30 minutes (Tr. 183).

(7) On the first voyage the Vessel discharged at

Okinawa in a total elapsed time of 9 days, 15 hours and 40 minutes (Tr. 185).

(8) At Mukilteo, Okinawa and Kure the Vessel was worked 24 hours a day, 7 days a week, with only minor exceptions (Tr. 183-184, 185-186, 209-210), whereas at Bangor she was worked 24 hours a day for only three days, then left idle for a week-end, then worked one or two shifts a day for five days and left idle for another week-end, then worked only one shift a day for five days and left idle a third week-end, then worked only one shift a day until loading was completed (Tr. 190-194).

(9) Reverses in Korea could not have affected loading at Bangor, since loading at Bangor was completed on November 10, 1950 (Tr. 194), while the Chinese did not enter the war in Korea until late in November or early December, 1950 (Tr. 300).

(10) There is no evidence that the hazard of handling ammunition, or the "mass detonation" problem, was in any way related to the delay at Bangor. In fact, to the contrary, since it affirmatively appears that the delay was caused by the failure of appellee to work the Vessel more than one or two shifts a day and not at all on week-ends, rather than merely a continuous but slow loading procedure, the inescapable inference is that the handling hazard or mass detonation problem did not contribute to the delay.

There is no evidence contrary to the foregoing.

There is no evidence from which any excuse for the delay can be inferred.

The sole and inevitable conclusion to be drawn is that the redelivery of the Vessel to appellant was un-

reasonably delayed by at least 11 days, 17 hours and 15 minutes by reason of appellee's failure to load the Vessel with reasonable diligence or within a reasonable time under the circumstances at Bangor.

D. The Delay at Bangor Was Not Waived by Appellant.

Appellee, apparently recognizing the fact of an unreasonable delay at Bangor, now claims a waiver. This claim has no legal merit, comes too late and is not supported by the record or the findings.

A waiver is a voluntary relinquishment of a known right. Here the vessel left Bangor on November 10, 1950, approximately one month *prior to* the expiration of the 120-day flat period specified in the charter party. At that time, since appellee had an absolute right to overlap, and since a voyage within the world-wide trading limits specified in the charter party could still have been accomplished even within the 120-day flat period, appellant had no legal right to withdraw the Vessel from the charter. Since appellant thus had no legal right which could be waived, appellee's authorities regarding waiver are inapplicable.

In addition, it is elementary that waiver is an affirmative defense which must be pleaded and proved. Appellee did not plead a waiver, although it had two opportunities to do so (Answer, Tr. 9-10; Amended Answer, Tr. 43-54). For this reason neither appellant nor appellee offered any evidence regarding protests or the lack thereof. The findings of fact, prepared by appellee, originally contained a statement in findings of fact VI and VII that the Vessel was loaded at Bangor and sailed therefrom "without objection from Libelant."

Upon appellant's request, since this statement was not material to any issue in the case at that point, the court below interlineated the words "evidence disclosing," making the statement in each finding read "without *evidence disclosing* objection from Libelant" (Italics added).

Now, not having presented evidence to meet an issue never tendered by appellee in its pleadings or proof, appellant is met with a contention on appeal that appellee has proved a waiver by the failure of appellant to disprove a waiver!

This negative approach to the problem of meeting the burden of proof becomes even more ridiculous when it is recalled that this occurred a month prior to the expiration of the original 120-day charter term, and that appellee had an absolute right to overlap under the charter party.

E. The Delay at Bangor Is Recoverable.

Appellee now contends that the delay at Bangor is not shown to have caused any delay in redelivery because the delay at Kure, for which appellant contends appellee is likewise liable, was an intervening cause of the ultimate delay in redelivery. In other words, appellee, by introducing the proximate cause concept of tort law into a contract case, attempts to expand the protection of its alleged sovereign acts at Kure to excuse prior delay not connected with those alleged sovereign acts. To put it another way, appellee asserts that it has made mistakes in sufficient numbers to avoid responsibility for any of them.

The simple answer to the argument is that appellee is liable for any delay on the overlap voyage caused by its failure to prosecute the voyage with reasonable diligence. *The Rygja,* 161 Fed. 106 (C.A. 2 1908). It is the delay itself that injuries appellant. Thus, such cases as *Memphis and Charleston Railway Co. v. Reeves,* 10 Wall. 176 (1870), relied upon by appellee at page 30 of its brief, are inapplicable. There the question was whether the delay was the proximate cause of the loss of goods. Here the question is whether any portion of the delay in redelivery was the natural result of the delay at Bangor.

The natural and proximate result of the delay at Bangor was that the Vessel arrived in Japan later than she otherwise would have, was discharged later than she otherwise would have been, and returned to Seattle and was redelivered later than she otherwise would have been. In the face of such simple arithmetic, appellee would have the Court speculate that had she not been delayed *at all* at Bangor, she might have been delayed *longer* at Kure. Appellant might with equal validity speculate that had there been no delay at all at Bangor, the Vessel would have arrived early enough to be discharged without any delay at all in Japan. In either event, there is no basis for such speculation. The natural result of the unreasonable delay at Bangor was an equivalent delay in redelivery at the end of the voyage. This is all that it required under the cases cited by appellee itself at page 28 of its brief.

F. The Redelivery of the Vessel to Appellant Was Unreasonably Delayed by Reason of Appellee's Failure to Provide a Berth and Discharging Facilities for and Discharge the Vessel with Reasonable Diligence or Within a Reasonable Time Under the Circumstances at Kure.

Here again there is no disputed testimony or other evidence, and this Court is free to draw its own conclusions of ultimate fact. Appellant relies upon the following facts as requiring a conclusion in its favor on this point:

1. The congestion at Kure was voluntarily created by appellee, and thus cannot excuse the delay. It is undisputed that the only ships in Kure in December and January were M.S.T.S. ships (Tr. 290-293, 322, 352), and it is apparent that the Vessel would have been given a berth and discharged immediately upon her arrival at Kure but for that congestion. As Colonel Sanderson testified:

> "Q. Can you state what period was common for the delay of vessels in Kure?
>
> A. Well, I would say that it could not be less than a month, *so many came in at one time.*" (Tr. 310) (Italics added)

2. The congestion and lack of storage space, and particularly the oversupply of 105 and 155 howitzer ammunition, in Japan existed *prior to* the entry of the Chinese into the Korean War. The testimony on this point is as follows:

Colonel Sanderson:

> "Towards the end of November, 1950, *due to the success of our campaign and the catch-up of ton-*

nage moving into the theatre, many ships instead of coming into Japan to discharge their cargoes, were diverted at sea to proceed to Korea because we had opened up ports in Korea to take cargo direct instead of reshipping it out of Japan to the port of Pusan." (Tr. 299-300) (Italics added)

(Comment: In other words, anticipating rapid success after the Inchon landing in September, appellee shipped ammunition into Japan so fast that the tonnage caught up to and exceeded available storage space. Consequently, ships were diverted to Korean ports for discharge.)

"A. * * * Since the latter part of *July* and *August* and of *September* we had built up a *tremendous* amount of reserve of certain types of ammunition in Korea, and also we had built up a *tremendous* amount of ordnance ammunition in Japan that we had reached in many cases, which has been brought out by previous testimony in cases that are now a matter of record and have no classification, of certain cargoes which were in abundance, certain types of ordnance and ammunition were in abundance, and other cargoes were very scarce." (Tr. 301) (Italics added)

"Q. *Will you describe the ammunition that had the low priority and of which you state that you had an overabundance?*

A. Small arms was down on the list, 30 caliber, 45 caliber, 50 caliber. *On artillery pieces it was the 105's, the 155's* which were not of extreme high priority, but I would say were the middle low priority." (Tr. 301-302) (Italics added)

(Comment: In other words, as early as July, August and September, 1950, long before the Vessel was even

loaded for the second voyage, Japanese storage areas became overloaded with "a tremendous amount of" 105 and 155-mm. howitzer shells and available storage space was exhausted.)

"A. The Port of Kure, *due to the overflow of ammunition entering into Japan* - - -

Q. That is, during the latter part of November, December and January?

A. Right, sir, *before December. In November, with the great tonnages of ammunition that was moving into Japan and on into the ordnance ammunition depots, which were limited in number, the ammunition depots, that such a big backlog of cargo had accumulated in the only available depots, that steps had to be taken to look further into the old Japanese depots,* ones which we had not used since we occupied the country. There were three that I know of: Kure, Miseru, and one in the north of Japan, of which I do not know the name." (Tr. 307) (Italics added)

Lt. Colonel Blust:

"Also, *there was considerable congestion at the depots that had been previously established,* both rail and at the ports that had been used. *So, we opened up an operation at Kure."* (Tr. 346) (Italics added)

(Comment: In other words, existing Japanese depots were congested *prior to* the November survey and consequent opening up of Kure as a port and storage depot.)

"There were many, many ships having nothing but 155's, and there was a lot in storage." (Tr. 347-348) (Italics added)

"Q. But do you remember quite clearly that during the period December, 1950, there were lots of 105 and 155 artillery ammunition around?

A. Well, that is my recollection, yes, sir. *We were always heavy on that. That seemed to be the biggest thing coming over.*" (Tr. 351-352) (Italics added)

(Comment: In other words, Japanese depots were overloaded with 105 and 155-mm. howitzer ammunition *prior to* the Korean reverses. Nevertheless appellee continued to ship large additional quantities of the same into Japan. In fact, the Vessel itself was originally destined for Yokohama.)

3. The Vessel and other ships were ordered to Kure for discharge in early December when Kure was not yet ready to receive 105 and 155-mm. ammunition for storage. The evidence on this point is as follows:

Colonel Sanderson:

"Lieutenant Colonel Blust was the officer I recommended to make the original survey of the Port of Kure, and I believe this was shortly before Thanksgiving or around Thanksgiving, to look into the Port of Kure as an ammunition-handling port.

"Colonel Blust went down there and came back with a report. He proceeded to headquarters in Yokohama and made his report there with ordnance, of course, and the recommendation with the British forces there how much could be handled. *Nothing had been done prior to Colonel Blust's trip with the rehabilitation of the Japanese ammunition depots. If the depots had been opened up and had all their equipment in operable condition, discharge naturally could have been expedited, be-*

cause you could handle more, but because they had not been, the Port of Kure for quite some time could not be counted upon as a full-fledged ammunition port due to the hinterland facilities not having been rehabilitated in five years, since 1945 or prior thereto.

Q. Was that a port for vessels with cargo similar to that shown in the manifest, Libelant's Exhibit 20, that were sent from Yokohama and Moji for discharge?

A. Yes, sir, vessels were sent there to have their cargo placed into the ammunition depots." (Tr. 310-311) (Italics added)

(Comment: In other words, when first opened in early December Kure had only a limited storage capacity at best. Nevertheless, " . . . vessels were sent there to have their cargo placed into the ammunition depots.")

"A. The Ordnance, that is their responsibility, made a report of the depots which would have to be rehabilitated before any great amount of cargo or ammunition could move into those depots.

Q. And that report was made some time during the month of November, 1950?

A. I think it was in November, because they were given a short time to make this survey. As to the exact dates and the period covered, I cannot say.

Q. *And at that time other depot facilities in and around Kure were taxed beyond their capacity, I take it?*

A. *Kure had not been opened up for ammunition until this survey was completed.*

"Q. *Were those the only facilities for storage of*

ammunition that were to be available at Kure, then?

A. *At Kure, yes, sir.*" (Tr. 316) (Italics added)

Major Scales:

"Q. Do you know if the Japanese ammunition dumps at Eta Jima and Kure were rehabilitated and ready for ammunition storage on December 1st?

A. On December 1st?

Q. Yes, by December 1st.

A. By what standards do you mean? Do you mean by the standards we would normally accept within the Ordnance Corps for the movement of ammunition and the acceptance of ammunition, or by what?

Q. Were they ready to take and did they commence storing ammunition in them?

A. They took *some* ammunition. They received ammunition, yes, sir.

Q. Were they still in the process of doing further rehabilitation?

A. They were rehabilitating ammunition depots within Japan until 1953, sir, yes.

Q. *I want to be a little more specific particularly with respect to the facilities right there in and around Kure. Do you know whether they were still in the process of rehabilitating those Japanese depots in December, 1950?*

A. *I would say yes, sir, such things as rail lines, revetments and things like that that had been demolished under the occupation policy.*

Q. As they were rehabilitated they would be ready for more storage?

A. Their total storage capacity would be greater,

yes, sir. Their daily capacity would be greater, yes, sir." (Tr. 340-341) (Italics added)

Captain Craig:

"Q. Did you receive any further advice from anyone in the Harbor Master's office as to why you were not discharged?

A. Well, there was an assistant there, a Master Sergeant, I believe he was, and I had a talk with him one day in the office there, and he—*he did tell me that they were making a new ammunition dump and that we wouldn't be discharged until that was ready to receive the ammunition.*" (Tr. 211) (Italics added)

4. Despite repeated inquiries by Captain Craig, appellee made no effort to discharge the Vessel until word was passed along that her charter had expired, notwithstanding the fact that special arrangements could have been made for immediate discharge. The testimony on this point is as follows:

Captain Craig:

"Q. . . . going back to the period in which you lay at anchor in the stream awaiting a berth at Kure for discharge, you say you were first advised by Captain Robertson that you would be unloaded by Christmas. Thereafter did you inquire, make any inquiries of the Harbor Master for orders for discharge?

A. I went ashore almost every day to the Harbor Master's office, and every time I was in his office I asked him when he was going to start discharging us." (Tr. 210-211)

"Q. . . . when you were finally discharged were you advised why you were being discharged?

A. . . . prior to discharge there was a civilian, I believe he was the United States Ammunition Inspector for that area, came aboard, and it was from him that I first received information that they were going to start discharging me, *and he came aboard, I think it was about January 10th, and told me that he had received . . . orders from the Logistics Command in Yokohama to get the ship discharged as quickly as possible and get her back to Seattle as the charter had expired.*" (Tr. 212)

"Q. Was there an M.S.T.S. representative there?

A. Not stationed at Kure, no.

Q. Did any M.S.T.S. representative contact you at Kure?

A. Not until late in January when I got word to start discharge, and then the representative came down from Kobe.

Q. And did he give you any instructions at that time?

A. He gave me instructions that after discharge I was to go back to Seattle." (Tr. 215-216)

Colonel Sanderson:

"Q. So, as a general proposition the port authorities who controlled the discharge of the vessels had no information whatsoever as to whether or not charters had expired or were about to expire or what terms vessels were chartered for?

"A. There were two ways we found out or we would be informed, and that would be through the M.S.T.S. representative who would be in Yokohama, who would advise the transportation section of the Japanese Logistical Command of certain conditions or whether the master of the vessel,

when he made his port of call, advised the port authorities, who were responsible for his discharge, that his charter was to run out a certain date and he wanted his ship discharged, and so forth. That would be the only two ways we would know about charters running out." (Tr. 328-329)

5. The Vessel could have been fully discharged promptly at Moji, but instead was sent to Kure and consequently delayed. On this point Captain Craig testified that Moji was one of the principal ports for the southern island of Japan and had facilities for handling many ships. Ample native longshoremen, who worked under the supervision of army personnel, were available, as were facilities for the discharge of cargo over-side into barges. At that time the Moji harbor was not congested. An M.S.T.S. representative was available at Moji, and Captain Craig was ashore quite often to talk to him and thus had ample opportunities to observe available facilities at Moji from both ship and shore (Tr. 205-207). Based upon this observation, Captain Craig testified as follows:

"Q. Based upon your observation of the facilities available . . . , could your entire cargo have been unloaded at Moji?

A. It certainly could, according to the facilities I observed." (Tr. 205-206)

"A. There was untold wharfage space, and if they wanted there were plenty of barges in the stream, and they used the stream often in commercial discharge, so there was both facilities out in the stream and alongside for discharging the vessel.

* * *

"A. From my observation there was plenty of labor available." (Tr. 207)

Instead, the M.S.T.S. instructed the Vessel to proceed to Kure, a port just newly opened up, with known inadequate storage capacity ashore, for discharge, together with so many other M.S.T.S. ships that congestion was bound to cause delay.

6. Even had the Vessel been discharged in order of her arrival at Kure, her discharge would have commenced only seven, rather than 30, days after arrival, and she would have been discharged within 14 days after arrival. The testimony on this point is as follows:

Captain Craig:

"Q. Now, how many berths were available for unloading vessels at Kure?

A. To my recollection, there were four berths.

Q. And they — would they accommodate four ships?

A. I believe they would.

Q. Did they also discharge vessels into barges?

A. They did, yes.

Q. What stevedoring facilities were available?

A. They had native longshoremen doing the actual discharging.

Q. And who supervised them?

A. Under the supervision of army personnel.

Q. Do you have an opinion, based upon your observation, your actual observation while in port at Kure as to how long it would have taken to discharge your vessel if it had been discharged in its regular turn?

* * *

A. Yes, I have an opinion.

Q. What is that opinion?

A. *In my opinion the vessel should have been discharged within seven days from the time of commencing discharge.*

Q. And do you have an opinion as to how long you would have waited for a berth, if you had been given a berth in turn, in your regular turn?

"A. In my recollection there were two ships in the harbor that went into the wharf after I arrived, and on that basis *I would say that I may have had to wait six or seven days and then gone alongside to discharge.*" (Tr. 214-215) (Italics added)

7. Other M.S.T.S. ships were discharged at Kure before the Vessel was, even though their charters all contained an option in favor of appellee for a 120-day extension, while that of the Vessel did not (Tr. 213-214, 290-293).

8. Basically, the situation at Kure, and in Japan generally, was parallel in all respects to the situation presented in *W. K. Niver Coal Co. v. Cheronea S.S. Co.,* 142 Fed. 402 (C.A. 1 1905), certiorari denied 201 U.S. 647 (1906), where the court said:

"However, even if there had been an insufficiency of wharves or of barges or lighters, that was not a matter beyond control, but a condition to which the consignee had contributed. It had four large coal steamers involved in these appeals, voluntarily bunched together in the port at Boston; and the case of the steamship LAKE MICHIGAN, disposed of at our last term, shows another even larger steamer for which it was responsible, in port at the same time. * * * Thus, while the Roath was delayed, more than her entire cargo was discharged

into lighters from other steamers chartered or controlled by the W. K. Niver Coal Company. Its own vessels, or vessels under its control, were given facilities which, if concentrated on the Roath, would have discharged her seasonably.

"The same course of reasoning is to be applied to all the steamers involved in the appeals before us. Each of them had her own rights as against the W. K. Niver Coal Company. They were not under a joint contract, but each was under a separate contract; so that each was entitled to assert her rights independently of the others, although the consignee had so involved itself by its several charters, or by charters on its account, that it was unable to do its duty by any of them. *A condition of affairs brought about by a contractor on the one part does not relieve him from his obligation to each of the contracting parties on the other part, acting severally, because the condition resulted in embarrassing all of them at the same time. To consent to any other rule would permit a contractor to relieve himself of his contracts in proportion to the number of parties he might involve in his own embarrassment by virtue of his own separate voluntary acts.*" (Italics added)

G. The Korean Reverses Were Not the Sole Proximate Cause of the Delay at Kure.

The evidence stated above clearly shows that the congestion and lack of storage capacity in Japan existed *prior to* the Korean reverses in December. This being the case, the "restraint of princes" exception could not excuse the delay at Kure. Here again the situation is parallel in all respects to that presented in *Hellenic Transport S.S. Co. v. Archibald McNeil & Sons Co.,*

Inc., 273 Fed. 290 (D.C. Md. 1921), where the court laid down the rule with respect to the "mutual exceptions" clause in a charter party, as follows:

> "In order that the contingencies specified in them shall constitute a good defense, performance must have been thereby rendered in a practical sense impossible, illegal or dangerous (Citations omitted). *It is not sufficient that the happening of one of them adds materially to the difficulties and embarrassment of the parties relying on it, if nevertheless it is still possible to perform* (Citations omitted).
>
> "It is true that the restraint may not have been directed against the ship or the goods. It may have had other objects as, for example, the prevention of ingress or egress to or from a besieged or blockaded place, and in that sense may have been indirect. (Citations omitted). *It must, however, have been the proximate, as distinguished from the remote cause.* (Citations omitted). *If by itself it could not have prevented performance, it will not excuse merely because, in combination with non-excepted causes, it did so.* (Citations omitted).
>
> " * * *
>
> "It is no light matter to weaken the binding force of mercantile contract, and the burden is heavily on him who asks that it be done. After the charterer, and others, who wished to ship coal abroad, had hired more ships than could be loaded with reasonable promptness, somebody was bound to lose heavily. (Citations omitted). Such miscalculations are always costly. They are less likely to be repeated if those who make them find themselves unable to shift the burden to other shoulders." (Italics added)

See, also, *United States v. Cargo of Linseed,* 20 F.(2d) 199 (D.C. N.Y. 1927), affirmed 28 F.(2d) 1021 (C.A. 2 1928). At the most, the Korean reverses merely added to the already existing congestion in Japanese ports.

H. Appellee Has No Immunity Regarding Sovereign Action Independent of the Charter Party.

In quoting from cases such as *Horowitz v. United States,* 267 U.S. 458 (1925), appellee overooks the peculiar nature of the redelivery obligation in a charter party. Even an Act of God is no excuse for failure to redeliver when due, unless expressly excepted in the charter party. *Schoonmaker-Conners Co., Inc. v. Lambert Transp. Co.,* 269 Fed. 583 (C.A. 2 1920). Therefore appellee has no immunity as a contractor regarding any delay resulting from sovereign action except that immunity contracted for under the "restraint of princes" exception in the charter party. And, in that context:

> "Restraint of princes means the operation of the sovereign power by an exercise of *vis major* in its sovereign capacity, controlling and directing for the time, the dominion or authority of the owner over the ship." *Baker Castor Oil Co. v. Insurance Co. of North America,* 60 F.Supp. 32 (D.C. N.Y. 1944), affirmed 157 F.(2d) 3 (C.A. 2 1946), certiorari denied 329 U.S. 800 (1947).

Here, all that happened at Kure was that appellee as charterer, for various reasons of its own, chose not to discharge the Vessel upon her arrival, but instead discharged others of its ships first. This voluntary omission simply does not qualify as sovereign action, much less a "restraint of princes" in the technical sense.

I. This Action Is Not Barred by Failure of Appellant to Demand a Revision of the Charter Rate of Hire Under Article 29 of the Charter Party.

This matter has been covered in appellant's opening brief (pgs. 43-47). However, appellee's treatment of the question deserves some comment.

Appellee's Amended Answer complains only of appellant's alleged failure to deliver a *demand* for revision (Article XIV, Amended Answer; Tr. 50). No issue was raised in the pleading stage or at the trial regarding any failure of appellant to accompany the demand with certain cost and other data, which would have been irrelevant in any event, under the circumstances. Appellee thought so little of this issue that it did not even offer in evidence the Answers of appellant to appellee's Request for Admission of Facts mentioned at pages 10, 11 and 21 of appellee's brief. Nevertheless, now, at the appellate level, appellee weakly attempts to *create* an arguable issue by raising a point not presented by the pleadings or proof, which issue is immaterial in any event.

Appellant submits that under the circumstances this Court should summarily dispose of this issue in favor of appellant on the grounds stated in appellant's opening brief.

J. Appellant Is Entitled to Recover Its Damages Herein.

Appellee now argues that its success in the trial court in resisting a portion of appellant's original claim is an "ingenious maneuver" on appellant's part, and evidence of appellant's "opportunism" (Br. 41-42). An

absurd claim! It lies ill in appellee's mouth now to complain of its own success in the court below.

Appellant seeks damages under the Suits in Admiralty Act, 46 U.S.C.A. §741, *et seq.,* which provides that:

> "Such suits shall proceed and shall be heard and determined according to the principles of law . . . obtaining in like cases between private parties."

Here, had a private charterer so delayed the loading of the Vessel and so burdened its discharge and storage facilities as to cause further delay from the congestion of its own ships at the port of discharge, the owner could recover its damages for the delay.

The evidence is clear that except for the delays at Bangor and Kure the Vessel would have been redelivered on or about January 2, 1951, and could have been rechartered immediately at $4.75 to $5.00 per dead-weight ton (Tr. 159-160). This being the case, appellant is entitled to damages for the total unreasonable delay of 41 days, 15 hours and 35 minutes in the sum of not less than $24,174.97 and not more than $27,766.35, together with interest and costs.

III.

CONCLUSION

For the foregoing reasons, and those specified in appellant's opening brief, appellant urges that this Court should reverse the decree of the court below and enter a decree awarding appellant recovery of its damages, interest and costs in the court below from appellee.

Respectfully submitted,

Bogle, Bogle & Gates
Stanley B. Long
C. Calvert Knudsen
Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.